

U.S. Department of Labor

Board of Alien Labor Certification Appeals  
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DATE: November 17, 2000

CASE NO: 2000-INA-67

*In the Matter of*

CLEVELAND PARK KINDER HAUS, LTD.  
Employer

*on behalf of*

HETTIARACHCHIGE KAMAMNEE A. WICKREMERAJNE  
Alien

Appearances: Mohamed Alamgir, Esq.  
For Employer and Alien

Certifying Officer: Richard E. Panati, Region III

Before: Burke, Huddleston, and Jarvis  
Administrative Law Judges

DONALD B. JARVIS  
Administrative Law Judge

### **DECISION AND ORDER**

This case arises from Cleveland Park Kinder Haus Ltd.'s ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has

determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

### **Statement of the Case**

On January 13, 1998, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the Washington, D.C. Department of Employment Services ("DOES") on behalf of the Alien, Hettiarachchige Kamamnee A. Wickremarajne. (AF 167-68). The job opportunity was listed as "Assistant Teacher". The job duties were described as follows:

DUTIES INVOLVED ARE TO [DAILY] FEEDING [sic], CHANGING, READING, SINGING, PLAYING, [and] TAKING WALKS. MAINTAIN RECORDS OF CHILDREN OF DAILY ACTIVITIES [sic]. NURTURING WARM AND COMPASSION[ATE] ATMOSPHERE TO CHILDRE[N]. GREET PARENTS AND ASSIST EACH CHILD TO REACH APPROPRIATE DEVELOPMENT STAGES.

(AF 167). The stated job requirements for the position, as set forth on the application, included a high school education and 2 years of experience in the job offered. (Id.).

The DOES referred the resumes of 52 applicants to Employer. On January 13, 1999, Employer submitted its Results of Recruitment Report stating that none of the applicants were hired. (AF 171-75). Employer asserted that 33 of the applicants were not qualified for the position because they lacked the required two years experience working as a day care teacher. (AF 171-74). Employer also stated that twelve of the U.S. applicants were rejected because they did not respond to Employer's telephone messages and seven of the U.S. applicants were rejected because they did not respond to Employer's letter requesting an interview. (AF 175).

The CO issued a Notice of Findings ("NOF") on March 10, 1999, proposing to deny the certification for two reasons. (AF 25-28). First, the CO found that the requirement of two years experience in the job offered is unduly restrictive as it exceeds the Dictionary of Occupational Titles ("DOT") norm for the position. (AF 27). The CO found that based on a review of the application, the DOT Code for the position should not be "Teacher, Day

Care, 092.227-018 (SVP 7 - 2 to 4 years),” but rather the correct DOT code for the position is that of “Day Care Worker, 359.677-018 (SVP 4-3 to 6 months).” (AF 26). The CO noted that the job duties to be performed listed on the Form ETA 750, Part A, Item 13, do not correspond with the job duties of Teacher, Preschool, which is a skilled occupation. The CO found that the job duties described in the application do not include “**instructing** children and **planning** activities to stimulate growth.” In addition, the CO noted that Employer was not requiring state certification nor was there any evidence that the Alien possesses state certification and there was also no evidence that the alien possesses two years of experience as a teacher, preschool. The CO noted that the Alien’s experience “at New York Avenue Presbyterian Church included providing child care and reading; and the alien’s experience with Helen G. Kirseh included child care and tutoring, but the application lacks evidence that the alien’s tutoring responsibilities are qualifying for the skilled position of Teacher, Preschool.” (Id.). The CO concluded that the position appears to be a Day Care Worker which has an SVP of 4. Based on this classification of the position, Employer’s requirement of two years experience in the job offered exceeds the DOT standard of three months to six months of combined education, training and/or experience. Employer was instructed to either submit evidence that the requirement arises from a business necessity or to reduce the requirements to the DOT standard. (AF 27). Second, the CO found that based on the finding that the two years of experience requirement was unduly restrictive, the rejection of 23 U.S. applicants for lack of two years experience as a day care teacher cannot be regarded as arising from lawful job-related reasons. (Id.). The CO found that Employer was in violation of Section 656.21(b)(6) and 656.20(c)(8) and explained that the burden of proof is on the Employer to show that U.S., workers are not able, willing, qualified or available for this job opportunity. (AF 28).

The Employer submitted its rebuttal on April 13, 1999. (AF 7-24). The Rebuttal consisted of a letter from Employer attesting to the business necessity of the experience requirement and asserted that while the job description does contain some duties that are within the description of Day Care Worker, the alien’s job offer is “primarily that of an Assistant Teacher.” (AF 11-22). In addition, the Employer submitted a job description of the Assistant Teacher position, resumes of people who have previously held the position, a permit showing a change in the business operation expanding the number of under-two year olds allowed at the facility, and reference letters documenting the Alien’s prior experience. (AF 11-24). Employer explained that the majority of duties to be performed by the “Assistant Teacher” include instructing the children and planning their activities, but that the “Assistant Teacher” must also perform some of the duties described under the definition of Day Care Worker. (AF 7). Employer asserted that the experience requirement bears a reasonable relationship to the occupation in the context of employer’s business and the experience is essential to perform, in a reasonable manner, the job duties as described. In support of this assertion, Employer argued that “a child’s intellectual and developmental capacity is directly related to the quality of instruction and stimulation that it receives as a pre-schooler.” (AF 8). Employer stated that:

The assistant Teacher, unlike a Day Care Worker, must be able to recognize the developmental stages of children so that she can ascertain whether the child is properly developing. Without at least two years of prior experience the Assistant Teacher will not be able to recognize the “red flags” of delayed development that would be otherwise apparent to those with the required experience. ... Were a person with less than the required amount of experience to interact with the children in the instant job described, the children’s development could suffer a commensurate downturn.

(Id.). Employer argued in response to the CO's finding that the job duties do not include instructing the children and planning activities to stimulate growth, that while not stated in the same terms, the application does require that the "Assistant Teacher 'assist each child to reach appropriate development stages' which 'naturally requires the alien to instruct the children and plan activities.'" (AF 9). The Employer also stated that state certification for this position is not required in the District of Columbia. In addition, Employer addressed the CO's findings regarding whether or not the Alien possessed the two years of experience as a teacher, preschool. Employer argued that "the alien clearly possesses two years or more of experience teaching pre-school children. The alien was a tutor for a pre-school aged child from 10/94 to 5/96 for the child of Helen Kirsch and the alien has also been a tutor from 10/94 to present for the New York Avenue Presbyterian Church." (Id.). Employer argued that the Alien's years as a tutor qualify her for the skilled position of an Assistant Pre-School Teacher.

The CO issued a Final Determination ("FD") on September 13, 1999, denying certification. (AF 4-6). The CO reviewed the Employer's rebuttal and concluded that it "failed to establish that your continued adherence to the two-year experience requirement arises from a business necessity." (AF 6). The CO explained that:

Great weight is placed in the rebuttal on the language, "assist each student to reach appropriate development stages." (Form ETA 750, Part A, Item 13) As to the question of whether the position is a Teacher, Preschool or a Day Care Worker, we do not find this language controlling. When this language is viewed in the context of the primary duties to be performed (Item 13), it is clear that the position is a Day Care Worker. Further, the duties performed by the alien, as reflected on Form ETA 750, Part B at Item 15, i.e., working in a private residence and in a church more closely resemble a Day Care Worker, rather than a Teacher, Preschool.

(Id.). In addition, the CO found that because Employer failed to establish that the two-year experience requirement arises as a result of a business necessity, twenty-three otherwise qualified U.S. workers were not rejected for lawful job-related reasons, and this job opportunity was not clearly open to any qualified U.S. worker. (Id.).

The Employer filed a Request for Review on October 18, 1999. (AF 1-3). The file was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA") for review.

### **Discussion**

In the NOF, the CO found that the correct DOT code for this position should not be Teacher, Day Care, 092.227-018, but Day Care Worker, 359.677-018 and therefore the two year experience requirement was unduly restrictive because it exceeded the normal SVP requirement for the position of "Day Care Worker." The CO provided then Employer with the option of either deleting the restrictive requirement or establishing that the requirement is justified by business necessity. The issues presented by this appeal are whether the requirement that applicants possess two years of experience in the job offered is unduly restrictive under section 656.21(b)(2) and if so, whether a business necessity for those requirements has been demonstrated.

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for, or qualify for, the job opportunity. The purpose of 656.21(b)(2) is to make a job opportunity available to qualified U.S. workers. *Venture International Associates*, 1987-INA-569 (Jan. 13, 1989) (*en banc*). An employer cannot use requirements that are not normal for the occupation or are not included in the Dictionary of Occupational Titles unless it establishes a business necessity for the requirement.

In its rebuttal, the Employer challenged the CO's classification of the position as a Day Care Worker and argued that the position is that of an Assistant Teacher. The CO responded, in the FD, that the primary duties listed on the Application for Labor Certification are essentially those described in the DOT for a Day Care Worker and that the duties performed by the Alien, as reflected on the Form ETA 750, Part B, at Item 15, more closely resemble a Day Care Worker, rather than a Teacher, Preschool. We find no error in the CO's categorization of Employer's position as a Day Care Worker. While we agree that there are similarities between the description of the duties of a "Teacher, Preschool" and a "Day Care Worker" we find that Employer's description of the job duties for the position of "Assistant Teacher" are more in line with the position of "Day Care Worker." The duties for the position of "Teacher, Preschool" include: "Instruct children in activities designed to promote social, physical, and intellectual growth needed for primary school, day care center, or other child development facility. Plans individual and group activities to stimulate growth in language, social, and motor skills...." (AF 26). The duties listed for the position of Assistant Teacher include daily feeding, changing, reading, singing and taking walks. Employer argues that the duties listed as "assist each child to reach appropriate development stages" is sufficient to show that this position is that of a Teacher, Preschool. (AF 9). We agree with the CO that as to the question of whether the position is a Teacher, Preschool or a Day Care Worker, this language is not controlling. In addition, we also agree with the CO that the Alien's prior experience as a tutor in a private residence and in a church more closely resemble the duties of a Day Care Worker, rather than a Teacher, Preschool.

Specific Vocational Preparation ("SVP") is defined in Appendix C of the DOT as "the amount of lapsed time required by a typical worker to learn the techniques, acquire the information and develop the facility needed for average performance in a specific job worker situation." *DICTIONARY OF OCCUPATIONAL TITLES* at 1009. The SVP for Day Care Worker<sup>1</sup> is listed in the DOT as 4, meaning over three months up to and including six months.

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<sup>1</sup> The DOT description of a Nursery School Attendant (any industry) alternate titles: child-care leader; child-day-care center worker; day care worker, Code 359.677-018 states:

Organizes and leads activities of prekindergarten children in nursery schools or in playrooms operated for patrons of theaters, department stores, hotels, and similar organizations: Helps children remove outer garments. Organizes and participates in games, reads to children, and teaches them simple painting, drawing, handwork, songs, and similar activities. Directs children in eating, resting and toileting. Helps children develop habits of caring for own clothing and picking up and putting away toys and books. Maintains discipline. May serve meals and refreshments to children and regulate rest

(Id.). Thus, the Employer's requirement of two years experience is not included in the DOT and must be adequately documented as arising from business necessity.

The Board defined how an employer can show "business necessity" in *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). The *Information Industries* standard requires that the employer show that the requirement bears a reasonable relationship to the occupation in the context of the employer's business, and that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. Vague and incomplete rebuttal documentation will not meet the employer's burden of establishing business necessity. *Analysts International Corporation*, 1990-INA-387 (July 30, 1991). Failure to establish business necessity for an unduly restrictive job requirement will result in the denial of labor certification. *Robert Paige, & Associates, Inc.*, 1991-INA-72 (Feb. 3, 1993); *Shaolin Buddhist Meditation Center*, 1990-INA-395 (June 30, 1992).

In the instant case, the Employer has not furnished the documentation called for in the NOF to establish a business necessity for the two year experience requirement. In its Rebuttal, the Employer asserted that the requirement of two years experience is justified by business necessity based on the fact that:

a child's intellectual and developmental capacity is directly related to the quality of instruction and stimulation that it receives as a pre-schooler. In support, the employer states that scientific testing has found a strong correlation between the amount of early intellectual stimulation and children's later language ability, vocabulary, and ability to score well on critical tests. The quality and quantity of such early intellectual stimulation is a major "definer" of language ability viewed as a whole.

(AF 8). Employer goes on to argue that without at least two years of prior experience, the Assistant Teacher will not be able to recognize the 'red flags' of delayed development that would be otherwise apparent to those with the required experience." (Id.). Employer did not offer any documentation to support these assertions or to show why an applicant with less than the two years experience would not be able to perform the job duties of an Assistant Teacher. Employer did submit its job description for Assistant Teacher. This job description detailed the responsibilities of the position, which included preparing with the head teacher the weekly lesson plans and to carry out appropriate and positive discipline as established by the head teacher. Based on Employer's job description, it appears that the Assistant Teacher will be under the supervision of and be following the instructions of the Head Teacher. This does not establish the business necessity of the two years experience requirement for an assistant position. In addition, we note that the Alien does not have two years experience as an "Assistant Teacher." The Alien may have experience working with children as evidenced by the letters of reference submitted with Employer's rebuttal, however, tutoring one child in a private setting and volunteering at a church providing tutoring and childcare does not qualify as working as an Assistant Teacher.<sup>2</sup>

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periods. May assist in preparing food and cleaning quarters. GOE: 10.03.03  
STRENGTH: L GED: R3 M2 L3 SVP: 4 DLU: 81

<sup>2</sup> We note that in Employer's Results of Recruitment Report, Employer rejected many U.S. applicants with experience teaching in settings other than a day care center, for lacking the required two

Here, Employer has done no more than make unsubstantiated assertions that the position requires two years experience. In order to demonstrate business necessity an employer must show factual support or a compelling explanation. *ERF, Inc. d/b/a Bayside Motor Inn*, 1989-INA-105 (Feb. 14, 1990). Unsupported conclusions are insufficient to demonstrate that the job requirements are supported by business necessity. *See generally, Our Lady of Guadalupe School*, 88-INA-313 (June 2, 1989); *Inter-World Immigration Service*, 1989-INA-490 (Sept. 1, 1989), citing *Tri-P's Corp., d/b/a Jack-In-The-Box*, 1987-INA-686 (Feb. 17, 1989). The Employer submitted insufficient evidence on rebuttal to support its assertions regarding business necessity. Consequently, we agree with the CO that the Employer has not established a basis for his restrictive experience requirement and it is not necessary to discuss the finding that Employer rejected qualified U.S. applicants for non lawful job-related reasons. It follows that the application for labor certification was properly denied.

### **Order**

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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DONALD B. JARVIS  
Administrative Law Judge

San Francisco, California

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years experience as a day care teacher. For example, applicant Alston has four years experience as a Head Start teacher assistant and one year of experience as a substitute teacher (AF 152) and applicant Newby has been a teacher with different child care centers for two and one-half years. (AF 108). An employer may not treat the alien's qualifications more favorably than it would treat the qualifications of a U.S. worker. *ERF, Inc. d/b/a Bayside Motor Inn, supra*.